IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN. UNDER ARBITRATION ACT No. 34 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S. MANIBHAI & BROTHERS (SLEEPER) - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR PARESH M DAVE for Petitioner(s) : 1,
NOTICE SERVED for Respondent(s) : 1 - 2.
MS AVANI S MEHTA for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 19/01/2007

ORAL JUDGMENT

1. The petitioner, a partnership firm, under took contract to supply sleepers to the respondent-Railways. The said contract was also re-entered by virtue of a repeat order. A dispute between the parties as to the rate payable per sleeper arose and hence as per standard terms of contract between the parties an Arbitrator named one Shri R.C.Agarwal came to be appointed on 3/7/2000. On 8/7/2002 the said Arbitrator resigned owing to his transfer to a different region. On 3/2/2003 the General Manager of respondent-Railways appointed one Shri Viswash Choubey as the Arbitrator with a condition to finalize the case within four months. On 29/9/2003 Shri Choubey resigned. Hence on 5/11/2003 one Shri A.K.Harit was appointed as the new Arbitrator with a direction to complete the arbitration proceedings within a

period of four months.

2. On 2/8/2005 the Arbitrator recorded minutes and in paragraph No.5 it was recorded thus,

> *"5.0. Both the parties agreed to extend the time limit for finalization of this case upto 31st December, 2005".*

It is an accepted fact that the arbitration proceedings were not concluded by the said date i.e. 31/12/2005, and Shri Harit was transferred to Kerala after 31/12/2005.

3. The petitioner wrote to the General Manager on 12/5/2006 (Annexure 'E') pointing out that the mandate of the Arbitrator had ceased on 31st December, 2005 and, therefore, meeting scheduled on 9/6/2006 should not be held as it was time barred. In the said communication, it was submitted that a retired High Court Judge may be appointed and for this purpose a request was made

to agree to the said proposal. The proposal also stated that upon the acceptance of the request the petitioner would submit a list of retired Judges or in the alternative the respondent may give such a list from which the petitioner will select a retired High Court Judge as an Arbitrator. It is an admitted position that no reply was at any point of time given by the respondents. The request was repeated by communication dated 29/5/2006 but the respondent failed to respond. It is at this stage that the petition has been filed on 19th July, 2006.

4. Heard Shri Kamal Trivedi, learned Sr. Advocate appearing with Shri P.M.Dave on behalf of the petitioner. According to him the respondent-Railways have forfeited their right to appoint an Arbitrator in terms of the contract in light of the peculiar facts of the case. That since 31st January, 2000, the Arbitrator and or his successor Arbitrator appointed as per terms of the contract in exercise of the right that the

respondent-Railways had by virtue of the terms of contract has not been able to finalize the Arbitration proceedings and make an award. That the request made on behalf of the petitioner to appoint a retired High Court Judge in the circumstances has to be appreciated in light of the fact that the dispute between the parties relates to the last such agreement which was of 1997. In support of the submissions made he has placed reliance of the Apex Court decision in the case of ***Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr. (2000) 8 SCC 151*** as well as the following decisions of the Allahabad High Court and the Kerala High Court, wherein the Courts have reiterated the principle enunciated by the Apex Court, in the cases of ***Universal Construction and Trading Company, Lucknow v. Garhwal Mandal Vikas Nigam Ltd., Dehradun and Ors. 2004 (1) Arb.LB 521 (Allahabad) and The Divisionl Railway Manager (Works), Southern Railway, Palakkad v. West Coast Agencies and Ors. 2005 (Suppl.) Arb.LR 428 (Kerala) (DB).***

5. Ms. Avani S. Mehta, the learned advocate appearing on behalf of the respondent authorities has submitted that there is no provision by which it could be stated that the tenure of the arbitrator has come to an end. In support of the submissions she has referred to and relied upon the following averments made in the affidavit-in-reply.

> *"It is submitted that there is no provision of fixed tenure in the Arbitration cases where the Arbitration Act 1996 is applicable. In the present case Arbitration Act 1996 is applicable. Therefore, the say of the petitioner that the term of the present arbitrator has come to an end is not true. It is submitted that both the parties had decided to conclude the hearing before an arbitrator by 31.12.2005.*
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> *Therefore, from the aforesaid, it is clear that the arbitration*

proceedings have been going on since last six years and hearing has taken place and various statements have been filed before the arbitrator and the communication after 31.12.2005 would also show that the present arbitrator is functioning as arbitrator and that no terms has expired as stated in the petition and that the proceedings are about to be concluded in the next hearing and, therefore, after investing six years, the present petition should not be entertained".

5.1. Alternatively, it was submitted that as per standard conditions of contract entered into by both the parties, vide condition No.2900 a sole Arbitrator, who should be a Gazetted Officer is required to be appointed by the General Manager. That, therefore, the petitioner cannot claim any other relief as the petitioner is bound by the said condition having entered into the contract with the Railways. That once such procedure had been prescribed as part and parcel

of the terms of the contract even the Court cannot deviate from the same and can only direct the parties to adopt and follow the procedure laid down by way of conditions of contract. She has placed reliance on the following two decisions of the Apex Court in support of the submissions.

[1] ***Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr. (2000) 8 SCC 151.***

[2] Union of India and Anr. v. Sohan lal Puglia (2004) 1 SCC 768.

6. The facts stated hereinbefore are not in dispute. The limited issue that falls for consideration is as to whether a party to the contract is bound by the terms of contract regardless of whether the arbitrator appointed as per terms of the contract does not make an award within the time stipulated or the extended time as agreed upon between the parties. Admittedly, in exercise of the powers as per conditions of

contract the General Manager appointed three Arbitrators, one after another, and each time the period within which the Arbitrator was supposed to make his award was fixed at four months. It is also an accepted position that none of the Arbitrators could complete the arbitration proceedings within that tenure of four months. Every time the proceedings continued after the tenure was extended, but yet the proceedings were not finalised. In the pleadings, both the sides have made various averments as to why the delay took place: each side accusing the other for causing the delay. It is not necessary to enter into the said controversy as to who was at fault for the purpose of the proceedings not being completed within the period originally fixed and extended from time-to-time. However, one common thread running all through out is the officer so appointed by the General Manager was transferred out and thus, requiring appointment of another Arbitrator.

7. In the circumstances, the case at hand shows

the basic fallacy in the procedure prescribed by way of conditions of contract whereunder a Gazetted Officer of Railways who is appointed as a Sole Arbitrator, on the ground that he is well versed with the functioning of the Railways including the terminology employed by the Railways and the contractors working with Railways, does not yield any tangible result for the simple reason that the officer gets transferred, as contended on behalf of the Railways in normal course of service. It is necessary that the Railways, at the highest level, should apply their mind to this situation and avoid such a situation wherein time lapses and the entire object with which arbitration proceedings are undertaken gets frustrated. One way could be: the officer appointed as an Arbitrator is kept out of purview of routine transfers and simultaneously ensure that the arbitrator puts a curb on the adjournments sought by either side. The Railways are required to devise some effective mechanism as otherwise

their bona fides to leave the disputes resolved would come under a cloud of doubt.

8. The concept of arbitration, stated be in simplest terms, means resolution of dispute between the parties at the earliest point of time without being mired in procedural and technical niceties associated with functioning of Civil Courts. The facts of the present case show that the entire object with which the condition has been incorporated in the contract as standard condition of contract by the Railways stands frustrated, may be because of circumstances beyond the control of the officer who is appointed as an Arbitrator. The Court is not required to assign any motive or default qua an officer but the events speak for themselves, that for the reasons beyond the control of the officer concerned the arbitration proceedings do not get completed.

9. In the aforesaid situation the parties cannot

be tied down to the standard conditions of contract, especially when nearly more than six years have already lapsed since the order of appointment of the first Arbitrator, bearing in mind the fact that the dispute emanates from a contract executed in 1997. Arbitration proceedings are required to be terminated fruitfully at the earliest. No party can be permitted to drag on such proceedings interminably. The Courts have consistently held that a party to the contract is entitled to exercise its right within the period stated in the notice issued by the other side, and also beyond that, the outer limit being the date of filing of the petition by the aggrieved party.

10. In the case of ***Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr. (supra)*** on which reliance has been placed by both the sides, the Apex Court has laid down as follows:

> *"19. So far as cases falling under Section 11(6) are concerned -such as*

the one before us-no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party

> *ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited".*

This view has been reiterated by the Apex Court in the case of **Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638**.

11. In the case of **Transwind Communication & Electronics Pvt. Ltd., v. Bharat Sanchar Nigam Ltd.** in Arbitration Petition No.56 of 2005 vide order dated 22/12/2006 this Court has also followed and applied the ratio laid down by the Apex Court in the following terms:

> *"In so far as the claim of the respondent authorities that they have the exclusive right to appoint an Arbitrator, suffice it to state that once the petitioner had called upon the respondent authorities to exercise the said right, it was*

incumbent upon the respondent authorities to act in that regard within a period of 30 days. Having failed to do so, as stated by the Apex Court in the case of Punj Lloyd Ltd. (supra) a party having right to appoint an arbitrator loses the said right if an Arbitrator is not appointed within 30 days of service of notice upon that party".

12. It is also necessary to take note of the fact that in the judgments of Division Benches of the Allahabad High Court and Kerala High Court, on which reliance has been placed on behalf of the petitioner, similar view has been taken.

13. Admittedly, in May 2006 the respondent was given an opportunity after the extended term of Shri A.K.Harit, the third successive arbitrator had expired on 31/12/2005. The learned advocate for the respondents could not dispute the fact that the General Manager did not respond. The General Manager could have rejected the request

and proceeded to exercise his right as per the condition in the contract. He failed to do so. The position in law is well settled. The right under the contract stands forfeited. In the aforesaid circumstances, taking into consideration the fact that there is no dispute between the parties that the issue between the parties emanating from the contract is required to be resolved through arbitration Shri M.S.Parikh, retired Judge of this High Court, is hereby appointed to act as a Sole Arbitrator.

14. The petition accordingly stands allowed. There shall be no order as to costs.

(**D.A.Mehta, J.**)

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